Supreme Court of the United States.

OCTOBER TERM, 1930. No. 368.

The Susquehanna Power Company,
Appellant,

v.

State Tax Commission of Maryland.

APPELLANT'S BRIEF.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND.

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OFFICIAL REPORT OF THE CASE IN THE COURT OF APPEALS OF MARYLAND.

The opinion below was delivered on June 12, 1930, and will be reported in 129 Md. . It is not yet available in the bound volume of Maryland reports. It is, however, reported in 151 Atl. 29. It also appears in the transcript of record, pp. 324-345.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The Appellant has duly filed with this Honorable Court a "Statement As To Jurisdiction On Appeal" in compliance with Rule 12, Section 1 of the Revised Rules of this Court. Inasmuch as the validity of the action of the State Tax Commission pursuant to the Public General Laws of Maryland (1924), Article 81, was by the Appellant in this case called in issue as repugnant to various portions of the Federal Constitution, and inasmuch as the decision below was in favor of the validity of the action of the State Tax Commission under the State statute, it is submitted that, under the provisions of U. S. C. A. Title 28, §344, this Court will review the decision upon appeal in the nature of a writ of error, under the provisions of the Act of Congress of January 31, 1928, c. 14, as amended by the Act of Congress of April 26, 1928.

QUESTIONS PRESENTED.

Has the State of Maryland the power to assess the tax complained of on "submerged lands" constituting the bed of the Susquehanna River, the paper title to which is held by a Licensee of the Federal Government which has constructed a dam in aid of navigation, after the lands have been completely and permanently submerged pursuant to the exercise of the License?

If such power exists, is an assessment lawful which includes the value given to the waters of the River by the exercise of the powers granted by the Federal License and arbitrarily exceeds the assessed value of unsubmerged adjacent lands of other taxpayers?

STATEMENT OF CASE.

The assessment now on appeal before this Court had its origin in an item of assessment made by the County Commissioners of Harford County on September 25, 1928, against The Susquehanna Power Company for the taxable year 1929, reading as follows:—

"Submerged Land and Rights $6,622,816." (R. 16).

On October 4, 1928, following general objections filed by the Appellant (R. 18), the said County Commissioners submitted "the items of all that go to make up the assessment on the property of The Susquehanna Power Company in the Fifth Election District of Harford County, as follows" (R. 21, 22):—

* * * * * * *

"Submerged lands, 2,110 acres, and rights therein $6,620,786."

* * * * * * *

After a hearing on October 4, 1928 (R. 18), The Susquehanna Power Company took its appeal to the State Tax Commission (R. 24) and after a hearing at which considerable oral (R. 49-220) and documentary evidence was taken the State Tax Commmission on October 11, 1929 (R. 316), filed its order reversing the County Commissioners and making a revised assessment wherein the item in question appeared as follows (R. 317):—

"2,110 Acres (more or less) submerged land $2,349,300."

Under date of November 7, 1929 (R. 1), The Susquehanna Power Company took its appeal from the foregoing order to the Circuit Court for Harford County and on November 29, 1929 (R. 317), the said Court after argument entered its order (without opinion) affirming the action of the State Tax Commission. From this order the Power Company filed its appeal on December 6, 1929 (R. 317-318), to the Court of Appeals of Maryland. On June 12, 1930, in an opinion (R. 324-345) filed that day the Court of Appeals of Maryland re-affirmed the order of the State Tax Commission.

The "2110 acres (more or less) submerged land," which is the subject of the $2,349,300. tax assessment for the year 1929 (R. 317), involved in this appeal, constitutes a portion of the bed or bottom of the Susquehanna River in the Fifth Election District of Harford County, Maryland (R. 22, middle of page; and R. 326). It is the same identical property which was assessed for the year 1928 as (R. 15):—

"2110 acres, Bed of River, at $10., $21,000."

Except for the fact that it is covered or "submerged" by the water of the Susquehanna River it is land of substantially the same general character as the adjoining shore land in the same Election District which is assessed to the same taxpayer by the same taxing authority for the same year 1929 as follows (R. 317):—

569.81 Rocky hillside land at $20. per acre $11,396.
888.67 Acres Woodland at $30. per acre $26,460.

It is self evident that the "submerged land," *qua land*, in its flooded condition (90 feet deep in places (R. 102)) is of no use to support life, except possibly fish or other aquatic life and as such it actually has no substantial value. Prior to the construction of Appellant's dam (in 1928) by far the major portion of this "submerged land" area constituted the rocky, shoaly natural bed of the Susque-

hanna River and the small remaining portion might be classed under one or the other taxable heads, of "rocky hillside land," or "woodland." Numerous instances of the taxable value of land (which is actually used and occupied by human beings) in this immediate neighborhood (R. 116) indicate clearly that most of it is assessed at from $10. to $25. per acre with certain rare exceptions as high as $50. or $60. per acre (R. 114-117). These rates are what counsel for the taxing authorities refer to as "the regular price" or "the regular county rates" (R. 108) and are in marked contrast to the tax valuation placed upon Appellant's "submerged land" of approximately $1113. per acre.

As it is the contention in this case, of the Appellant on the one hand, that the State of Maryland has no power at all to tax these "submerged lands" and it is the contention of the State of Maryland (by its State Tax Commission supported by the decision of the Court of Appeals) on the other hand that it not only has the right so to tax but also that it may exercise that right by placing a valuation thereon for taxation purposes of more than 10,000% greater than other similar, but unsubmerged, land in the vicinity, it would seem to be of interest here to sketch briefly the history of the lands in question and the Appellant's relation thereto from a legislative and corporate fact standpoint.

The *bed** of the Susquehanna River (of which the lands, included within the assessment here complained of, are a part) has repeatedly been declared by the State of Maryland, as well as by the neighboring State of Pennsylvania, to be *a public highway*. This fact may be apparent from the following quotations, viz.:—

From Act of January 20, 1798 (Laws of Maryland 1797 Chap. 99):—

> *"The bed of the river Susquehanna,* from the Maryland line to tidewater, *shall be considered a public*

* Italics in quotations throughout this Brief are ours, unless otherwise noted.

highway, free for any person or persons whatever to work thereon in clearing the obstructions to its navigation."

From Act of February 19, 1801 (Laws of Pennsylvania, Vol. III Smith's Laws, p. 462):—

"SEC. 5. And be it further enacted by the authority aforesaid, That *the river Susquehanna* down to the Maryland line, shall be, and the same *is hereby declared to be a public highway*, any Act or law of this Commonwealth, to the contrary notwithstanding."

From Act of January 27, 1814 (Laws of Maryland 1813 Chap. 116):—

"In consideration of the Act of the Legislature of Pennsylvania, passed February 19, 1801 (etc. describing the act last above quoted), *the bed of the river Susquehanna* from the Maryland line to the bay of Chesapeake, *is hereby declared, and shall forever hereafter be, a public highway*, and individuals or bodies corporate may at all times remove obstructions to its navigation."

It will be noted that both of the Maryland acts above referred to conferred a general right *upon the public* to clear or remove from this public highway "obstructions to its navigation." Each of these acts, however, carried a proviso that this right was not to be exercised with respect to "obstructions" which might be placed in the highway by a corporation known as "The Proprietors of the Susquehanna Canal" which was given (by these and numerous other acts) very broad powers to construct works designed to promote navigation in this public highway. All of the corporate powers and authorities of the said "The Proprietors of the Susquehanna Canal" have become vested in the present Appellant, The Susquehanna Power Company, as will be seen from Section 5 of its 1908 Charter hereinafter referred to.

Among the corporate powers and authorities of The Proprietors of the Susquehanna Canal, so vested in this Appellant as aforesaid, is the following from the Act of January 22, 1785 (Laws of Maryland 1784, Chap. 66), viz.:—

> "That the said canal, locks and other works * * * *shall not be subject or liable to pay any tax, imposition, duty or assessment, whatsoever; * * * that is to say,* provided always, that *such exemption from taxation shall extend to such works as relate merely to,* and are necessary for, the *navigation* of said canal."

The Susquehanna Power Company, appellant in this case, was incorporated many years ago by special acts of the General Assembly of the State of Maryland. From time to time its corporate powers have been amended, reaffirmed and enlarged by subsequent laws, the most important of which is the Act of April 6, 1908 (Laws of Maryland 1908 Chap. 268) generally referred to as the appellant's "1908 Charter." This law of the State of Maryland commences with certain preambles reading as follows:—

> "WHEREAS, The Susquehanna Power Company is about to undertake the construction of a dam or dams across the Susquehanna river between tidewater and Mason's and Dixon's line, the elevation of the crest or crests of which dam or dams shall not exceed one hundred and ten (110) feet; and
>
> * * * * * * *
>
> "WHEREAS, *The erection of a dam or dams on said river for power purposes makes possible the slack water navigation of said river as herein set forth, all of which uses are highly important for the welfare of this State,*"

and by its enacting clauses, *inter alia,* as follows:—

> "SEC. 3. *And be it further enacted,* That the said Susquehanna Power Company, its successors and as-

signs, be and they are hereby authorized and empowered to locate and build in, along or across the said river and the bed and shores thereof, and the canals, railroads, ferries and highways thereon, therealong or leading thereto, any dam or dams the crest or crests of which shall not exceed an elevation of one hundred and ten (110) feet above mean low tide at Havre de Grace, said dam or dams to be located at any points between tidewater and Mason & Dixon's line, together with all necessary power-plants and works, appurtenances and accessories."

* * * * * * *

"SEC. 5. *And be it further enacted.* That *in consideration of the construction* by the said Susquehanna Power Company, its successors and assigns, of a dam or dams in, along or across the said river, * * * said Susquehanna Power Company, its successors and assigns be and it is hereby declared to be also a slack water navigation company with all the powers and authorities of the charters of * * * The Proprietors of the Susquehanna Canal *to the end that in aid of the powers of Congress* it may create a safe and practicable navigation up and down said river, either upon the bed thereof, by means of said backwater or otherwise, or by means of a canal or canals along the margin thereof, or by means of such methods conjointly, either above or below said dam or dams, *to the end that real navigation of said river above tidewater in Maryland heretofore so often unsuccessfully attempted, may now be established.*"

* * * * * * *

"SEC. 7. And be it further enacted, That the said corporation so far as its gross receipts may result *from the sale of electrical energy* shall be subject to the provisions of Chapter 712 of the Acts of 1906, and *liable to pay the gross receipt tax* for said chapter *imposed on electrical construction and gas companies*

by said Act or by any subsequent amendments or modifications thereof."

* * * * * * *

"SEC. 10. And be it further enacted, That this *Act is hereby declared to be a public Act because of the purposes aimed to be hereby accomplished,* and shall be *construed liberally* both in aid of its terms and provisions and in aid of the public, and shall take effect from the date of its passage."

Our history up to this time presents a picture of single-handed effort on the part of the State of Maryland to do that thing which she declares in the preamble to Appellant's 1908 Charter to be so "highly important for the welfare of this State," namely to "make possible the slack water navigation of said river." Up to this point no "powers of Congress" have appeared, "in aid" of which (as the State of Maryland says in her 1908 Act, Sec. 5, *supra*) the various broad powers and rights have been vested in Appellant by the said State. On June 10, 1920, however, the Federal Government becomes an actor in this ancient drama for on that date there was approved an Act of Congress (41 Stat., p. 1063) known as "The Federal Water Power Act" which had for its object, first stated in its title, "To Provide for the Improvement of Navigation." As The Federal Water Power Act has a very important bearing on the questions raised by this appeal it would seem worth while here to outline briefly some of its more important provisions.

After defining (in Section 3, of the Act) "Navigable Waters" as meaning:—

"Those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition * * * are used or suitable for use for the transportation of persons or property in interstate or foreign commerce * * *."

Congress in Section 4 (*d*) of The Federal Water Power Act provides that a certain Commission, created by the Act and to be known as the "Federal Power Commission," is hereby authorized and empowered—

> "To issue licenses to citizens of the United States * * * or to any corporation organized under the laws of the United States or any State thereof * * * *for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation,* and for the development, transmission and utilization of power across, along, from or in any of the navigable waters of the United States * * * Provided further, that no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. *Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a water way or water ways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the Commission.*"

SEC. 6 provides that Licenses shall be issued for a period not exceeding fifty (50) years and shall be conditioned upon acceptance by the Licensee of all of the terms and conditions of the act and such further lawful conditions as the Commission may prescribe.

SEC. 8 provides that no Licensee may transfer or assign its License without the written approval of the Commission.

SEC. 10 provides certain general conditions applicable to all Licensees, viz.:—

> "(*a*) That the project adopted * * * shall be such as in the judgment of the Commission will be

best adapted *to a comprehensive scheme of improvement and utilization for the purposes of navigation,* of water power development, and of other beneficial public uses;"

"(*b*) That except when emergency shall require *for the protection of navigation,* life, health or property, no substantial alteration or addition * * * shall be made * * * without the prior approval of the Commission;"

"(*c*) That the licensee shall maintain the project works in a condition of repair adequate *for the purposes of navigation* and * * * shall so maintain and operate said works *as not to impair navigation* * * *."

(*d*) From surplus accumulated in excess of a specified rate of return on actual, legitimate investment, licensee must establish and maintain an amortization reserve to reduce said net investment.

(*e*) Licensee must pay to United States an annual charge to be fixed by the Commission from time to time.

(*f*) Whenever benefited by the construction work of another Licensee of an (upstream) storage reservoir each Licensee so benefited must pay said other Licensee such equitable amount as may be fixed by Commission.

(*g*) Other conditions as required by Commission.

(*h*) That combinations to limit the output or increase prices of electrical energy are prohibited.

SEC. 11 provides that *to promote the present and future needs of navigation,* consistent with a reasonable investment cost to Licensee, Commission may require any one or more of the following:—

"(*a*) That such licensee shall, to the extent necessary *to preserve and improve navigation facilities, construct,* in whole or in part, without expense to the United States, in connection with such dam, *a lock or locks,* booms, sluices, *or other structures for navigation*

purposes, in accordance with plans and specifications approved by the Chief of Engineers and the Secretary of War and made part of such license.

"(*b*) That in case such structures for navigation purposes are not made a part of the original construction at the expense of the licensee, then *whenever the United States shall desire to complete such navigation facilities the licensee shall convey to the United States, free of cost,* such of its *land and* its *rights of way* and such right of passage *through its dams or other structures,* and permit such control of pools as may be required *to complete such navigation facilities.*

"(*c*) That such licensee *shall furnish free of cost to the United States power for the operation of such navigation facilities,* whether constructed by the licensee or by the United States."

SEC. 12 provides:—

"That whenever application is filed for a project hereunder involving navigable waters of the United States, and the commission shall find upon investigation that the needs of navigation require the construction of a lock or locks or other navigation structures, and that such structures can not, consistent with a reasonable investment cost to the applicant, be provided in the manner specified in section 11, subsection (*a*) hereof, the commission may grant the application with the provision to be expressed in the license that *the licensee will install the necessary navigation structures* if the Government fails to make provision therefor within a time to be fixed in the license and cause a report upon such project to be prepared with estimates of cost of the power development and of the navigation structures, and shall submit such report to Congress with such recommendations as it deems appropriate concerning the participation of the United States in the cost of construction of such navigation structures."

SEC. 13. Each Licensee is bound to commence and complete the project within a time to be specified in the License.

SEC. 14. Upon expiration of the License the United States has the absolute right to take over the entire project upon payment of the "net investment" (as carefully defined by Sec. 3 taking into account amortization etc.) which is "not to exceed the fair value of the property taken."

SEC. 18:—

> "That the *operation of any navigation facilities* which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this Act, whether at the expense of a licensee hereunder or of the United States, *shall at all times be controlled* by such reasonable rules and regulations *in the interest of navigation*, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of War."

There are of course many other provisions in said Act designed to control the so-to-speak "by-product" use by Licensee of the dam and project for the development of hydro-electric power, but the above would seem to be sufficient to indicate the very real and important interest and right which the United States has and exercises over every licensed project from the standpoint of its use whether as actual or potential or both *in the matter of developing and promoting navigation.*

For an earlier consideration of the provisions of The Federal Water Power Act by this Court see *New Jersey* v. *Sargent*, 269 U. S. 328, 335-337.

On April 14, 1923 (see 3rd Annual Report of the Federal Power Commission, p. 190), the Appellant filed its Declaration of Intention with the Federal Power Commission and applied for a Preliminary Permit for a Project:—

"involving the construction of a dam and power house with appurtenant works in the Susquehanna River, in Cecil and Harford Counties, Md., and Lancaster and York Counties, Pa."

At its meeting held June 15, 1923 (see 3rd Annual Report of the Federal Power Commission p. 174) the Commission declared, *inter alia* (p. 191):—

> *"it appearing that said project can be developed into and adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation,* of water-power development, and of other beneficial public uses; it was voted that preliminary permit be issued for a period of two years, subject to the provisions of said act, to the rules and regulations of the Commission pursuant thereto, and to such conditions *in the interests of navigation* as may be recommended by the Chief of Engineers."

On Aug. 3, 1923, such a preliminary permit was issued to Appellant (4th Annual Report of F. P. C. p. 210).

At its meeting of January 2, 1925, pursuant to application by Appellant for a License (as distinguished from the preliminary permit already issued) to be issued jointly to it and a Pennsylvania corporation (because a part of the whole project would extend into the latter State) the Commission recited the full details of the proposed project and took the following action (see 5th Annual Report of F. P. C. p. 76):—

> "and the commission finding that said project *will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation,* of water-power development, and of other beneficial public uses, and that the contemplated improvement is desirable and justified in the public interest, *for the purpose of improving or developing said Susquehanna River for the use or benefit of interstate or foreign*

commerce; it was voted that upon approval of the plans of the dam and other structures affecting navigation by the Chief of Engineers and the Secretary of War that license be issued for a period of 50 years; subject to the provisions of said act, to the rules and regulations of the commission pursuant thereto, to the following special conditions, and to such further conditions, if any, as the Chief of Engineers may find necessary or desirable *in the interests of navigation."*

At its meeting of February 27, 1926 (6th Annual Rep. of F. P. C. pp. 104, 105-116) the issuance of a License to Appellant under date of February 20, 1926, for the proposed development ("Project No. 405," which has "come to be known as the Conowingo Project") was announced and the manner and method of financing the estimated cost thereof (amounting to upwards of Fifty-two Million dollars) by the issuance of stock and bonds under the direct supervision of the Federal Commission is recited in minute detail covering more than ten printed pages of the Report.

The Federal License (R. 288-311) issued to the Susquehanna Power Company, Appellant in this case, by the Federal Power Commission on February 20, 1926, after designating the Appellant as "Licensee 'A'" (R. 290), contains the following preambles:—

"WHEREAS, the Commission finds that said project, as hereinafter described, *will be best adapted to a comprehensive scheme of improvement and utilization of said waterway* (referring to Susquehanna River) *for the purposes of navigation,* of water power development and of other beneficial uses; and

"WHEREAS, the Commission, did, on the second day of January, 1925, find that the contemplated improvement is desirable and justified in the public interest *for the purpose of improving or developing a waterway, namely, said Susquehanna River, for the use or benefit of interstate and foreign commerce,* a certified copy

of the records of the Commission containing such finding being hereto attached;"

The grant of the License provides as follows (R. 292):—

"Now, therefore, the Commission hereby issues this License to the Licensees for the purpose of constructing, operating and maintaining certain project works *necessary or convenient for the development and improvement of navigation* and for the development, transmission and utilization of powers across, along, from or in said Susquehanna River."

Said "project works" are described in Article 2-C of said License as consisting, *inter alia*, of (R. 294):—

"(*a*) A dam and reservoir across and in the Susquehanna River; said dam being located a short distance above Octoraro, Maryland;"

The License is issued for a period of fifty (50) years from the date thereof (R. 293).

Some of the provisions showing the Commission's intense interest in the promotion of navigation by means of this project are as follows (R. 298, 299, 300):—

"Article 8. Insofar as any material is dredged or excavated in the prosecution of the work herein authorized, it shall be removed and deposited *so it will not interfere with navigation* and to the satisfaction of said District Engineer."

* * * * * * *

"Article 13. The operation *of any navigation facilities* which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this license shall at all times be controlled by such reasonable rules and regulations *in the interest of navigation*, including the control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of War. * * *"

"Article 14. Licensee 'A' shall construct and install such appliances as are necessary for *furnishing power for the operation of navigation facilities,* including lights and signals, whether constructed by the Licensees, or by the United States; and *shall furnish free of cost to the United States power for the operation of such navigation facilities.*"

"Article 15. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of War, *as may be necessary for the purposes of navigation.*"

"Article 16. *The Licensees, whenever the United States shall desire to install navigation facilities, shall convey to the United States, free of cost, such of their lands and rights of way and permit such control of pools as may be required for such navigation facilities; and Licensee 'A' shall grant to the United States, free of cost, such right of passage through its dams or other structures as may be required for providing or using such facilities.*"*

Many other provisions appear in the License regulating and governing the use of the project for hydro-electric purposes, the manner and method of operation, financing, etc., but the above are sufficient to indicate clearly that one of the primary purposes of the Federal Power Commission in granting the License *was to promote navigation on the Susquehanna River.*

The Susquehanna Power Company, Appellant here, accepted this License and all of its terms and conditions (including all of the terms and conditions of the Federal Water Power Act) by a formal resolution of its Board of Directors duly adopted prior to or simultaneously with the issuance of the License and filed written evidence of that acceptance with the Federal Power Commission similar in form to the written acceptance of its joint Licensee, Philadelphia Electric Power Company (R. 312). For some unknown reason a copy of this written acceptance appears to

* Italics ours.

have been inadvertently omitted from the Record (R. 312) in transcribing the License. The original acceptance of the Susquehanna Power Company may be found in the files and records of the Federal Power Commission.

Immediately upon receipt of its Federal License aforesaid and pursuant to all of the terms and conditions thereof The Susquehanna Power Company commenced in 1926 the construction of a dam almost a mile long (R. 217) across the Susquehanna River at a place known as "Shures Landing" (R. 325) a short distance above tidewater in Harford and Cecil Counties, Maryland. This dam was completed in 1928 and, of itself, now provides perfect navigation both up and down the Susquehanna River for a distance of almost fourteen miles (R. 101) by the creation of a long slack water pool extending upstream across the northern boundary of Maryland into the State of Pennsylvania as far as the Holtwood Dam (R. 103 "Homewood" there being a typographical error for "Holtwood"; sometimes otherwise known as the "McCall's Ferry Dam," see R. 324) of the Pennsylvania Water & Power Company. This Holtwood Dam, in turn, provides another slack-water stretch of river upstream for a distance of 8 miles. At the upstream end of the Holtwood pool there is now being erected by the Safe Harbor Water Power Corporation still another dam at an estimated cost in excess of thirty million dollars (see 10th Annual Report of F. P. C., p. 233). A Federal License for this Safe Harbor Dam was granted by the Federal Power Commission on April 22, 1930, and the slack-water created by it will extend upstream for a distance of another 10 miles (see 10th Annual Report of F. P. C., p. 233). At its meeting on March 22, 1930, when the erection of this Safe Harbor Dam was authorized the Commission found, *inter alia* (10th Annual Report F. P. C., p. 104):—

> "that said project (at Safe Harbor) will be best adapted *to a comprehensive scheme of improvement and utilization for the purposes of navigation.*"

and at the same meeting, the Commission provided that the License should only be issued upon the following condition (10th Annual Report F. P. C., p. 105):—

> "(*a*) That whenever the United States shall desire to construct, complete, or improve navigation facilities, *the Licensee shall,* in lieu of the natural channel to be appropriated for tail-water discharge, *provide a new navigation channel* of dimensions and alignment satisfactory to the Secretary of War *which shall meet the requirements of navigation under such future project as may be approved by Congress.*"

Above the ten mile slack water pool of the Safe Harbor project there exists the old Susquehanna and Tidewater Canal Dam across the river a short distance downstream from the City of Columbia, Pennsylvania. About ten miles further upstream is the existing dam of the York Haven Water Company at York Haven. The statement of the Executive Secretary of Federal Power Commission, at the meeting of the Commission on April 30, 1923 (3rd Annual Rep. of F. P. C., p. 155, 161), when the Appellant's project first came before the Commission for consideration, can therefore be readily appreciated (*id.*, p. 161):—

> "This dam (speaking of The Susquehanna Power Company's dam in Maryland), together with a proposed dam above the Holtwood project (*i. e.*, the Safe Harbor dam) *would create slack water extending practically all the way from tidewater to Harrisburg.*"

From the above some idea can be formed of what Congress and the Federal Power Commission have had in mind when they speak so frequently of *"a comprehensive scheme of improvement and utilization for the purposes of navigation,"* and when the Commission repeatedly finds as a fact *"that the interests of interstate or foreign commerce will be affected by"* the project of the Appellant and others.

The bed of the Susquehanna River beneath the slack water pool created by the dam of Appellant lies (R. 101) in four Counties of two States, viz, in York and Lancaster Counties in the State of Pennsylvania (64% of total area), and in Cecil and Harford Counties in the State of Maryland (35% of total area). It is the attempt upon the part of the State of Maryland by its State Tax Commission to assess for taxation 2110 acres (R. 22) of the bed of this River at a valuation of approximately 10,000% in excess of other similar, but unsubmerged, lands in the vicinity, which gives rise to this appeal.

The final disposition of this case will also determine the legality of an assesment upon a similar area of the river bed lying within the limits of Cecil County, Maryland.

Only *two-tenths of 1%* of the volume of water in the Susquehanna River which flows past the Appellant's dam arises or originates in the State of Maryland (R. 102). That is to say, of the total basin drained by the Susquehanna River, 33,000 square miles lies within the States of Pennsylvania and New York and only 65 square miles lies within the State of Maryland (R. 101). Another factor in determining the amount of power capable of development in any stream is the "head" or fall in the river available for use at the point of use. Of the total "head" of the Susquehanna available for use at Appellant's dam approximately one-half arises in the State of Pennsylvania and one-half in the State of Maryland (R. 101).

Although only a part of the physical property of the entire Conowingo Project is located in Maryland, and of that portion only a still smaller part is located in Harford County (for instance, it appears from R. 217 that only 1550 feet of the total length of the dam itself lies in Harford County, while the remaining 3,058 feet lie in Cecil County, Maryland), the said portion in Harford County has been assessed for taxation (in addition to the portion involved in the assessment now under appeal) in the very substantial sum of $9,674,333. (R. 317) *from which no appeal is pending.* Under these circumstances it is ap-

parent that the Susquehanna Power Company cannot justly be charged with an effort by this appeal to avoid payment of its fair share of the public tax burden in Harford County, Maryland.

The item appealed from applies only to an assessment in the Fifth District of Harford County. Appellant also owns "river bottom" lands in the Second District which embraces an area lying a short distance below Appellant's dam. These last mentioned lands were assessed by the County Commissioners of Harford County for the year 1929 as follows (R. 13, 15):—

"SECOND DISTRICT

203 Acres, River Bottom at $10.....$2,030.

It is of considerable interest to note that the State Tax Commission in its "reversal" (R. 316) of the County Commissioners with respect to Appellant's whole assessment in Harford County has eliminated entirely the County Commissioners' assessment of the lands in the bed of the Susquehanna River in the Second District *below* the Dam, although assessing the similar lands above the Dam at $1,113. per acre.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

I.

That the Court of Appeals of Maryland erred in affirming the judgment of the Court below (the Circuit Court for Harford County) whereby real property owned by the Appellant is assessed for taxation in the State of Maryland, at a valuation given to it as "submerged lands," which includes a value attributable to the waters of the Susquehanna River, flowing over said lands in which said Appellant has no right of property, and imposes upon the property of the Appellant a

tax without due process of law, contrary to the Constitution of the United States of America, and the Fourteenth Amendment thereof.

II.

That said Court of Appeals of Maryland erred in affirming the judgment of said Court below, whereby real property owned by said Appellant is assessed for taxation in the State of Maryland at a valuation given to it as "submerged lands," which includes a value attributable to a license granted to said Appellant by the Federal Power Commission, pursuant to the Acts of Congress of the United States of America, which value attributable to said Federal license cannot be included for taxation by the State of Maryland, or any political subdivisions thereof, and the tax thus imposed deprives said Appellant of its property, without due process of law, contrary to the Constitution of the United States of America, and the Fourteenth Amendment thereof.

III.

That said Court of Appeals of Maryland erred in affirming the judgment of said Court below, approving the assessment of the tax upon the real property of said Appellant, described as "submerged lands," which formed the bed of the Susquehanna River and the waters thereof impounded by the dam constructed by said Appellant, as a Licensee under said Federal license, granted by said Federal Power Commission, which "submerged lands" at the time of the assessment thereof for taxation by the State of Maryland and its political subdivisions, and subsequent thereto were in use by said Appellant as an Agent of the United States of America, and as an instrumentality to promote navigation upon a navigable river, which is a highway of interstate commerce.

IV.

That said Court of Appeals of Maryland erred in entering a judgment, whereby property of said Appellant, a unit

under said license, granted by said Commission and an Agent and instrumentality of the United States, to promote navigation of an interstate river is assessed for taxation for State and County purposes.

V.

That said Court of Appeals of Maryland erred in affirming said judgment of said Court below, whereby said assessment of real property of the Appellant for taxation in the State of Maryland, is arrived at by a different method, and upon a higher value than other real property owned by other taxpayers on the same tax roll or located in the same taxing district, and thereby the property of said Appellant will be taken without due process of law, contrary to the Constitution of the United States of America, and the Fourteenth Amendment thereof.

SUMMARY OF ARGUMENT.

The State of Maryland has no power to assess for taxation lands in the bed of the Susquehanna River, the paper title to which is held by the Appellant, after such lands have become completely and permanently submerged in aid of navigation pursuant to the terms of the Federal License granted to Appellant.

The "submerged lands" in the bed of the Susquehanna River did not acquire a value which is subject to taxation from the waters impounded upon such lands by the erection of a dam constructed pursuant to the Federal License primarily to improve the navigability of the Susquehanna River and, secondarily, to make useful the waters passing through the dam for the purpose of generating electrical energy.

If the *submerged lands* are subject to taxation by the State of Maryland, no lawful assessment thereof can be made which exceeds the assessment of similar lands which are unsubmerged.

ARGUMENT.

The record on this appeal shows that certain of the questions presented to and disposed of by the Court of Appeals of Maryland are based upon the law of that State, and the decision of that Court upon them is final.

Together with these questions there were raised in the Court below several defences to the judgment against the Appellant which are founded upon the protection afforded by the Federal Constitution as interpreted by the decisions of this Court, and the conclusions reached upon these questions by the State Court are here presented for review.

The State Tax Commission of Maryland had before it for consideration the tax assessed upon all of the physical property of the Appellant in the State of Maryland divided between Harford and Cecil Counties. Separate decisions were rendered, and therefore two appeals from the decision of the State Tax Commission to the State Courts were taken. The final decision from which this appeal was taken covers only the decision applicable to the property of the Appellant in Harford County, but the final decision of this Court when rendered will be made applicable by agreement to the pending appeal in the State Court as to the property in Cecil County.

The physical property of the Appellant in Maryland, consisting, *inter alia*, of the dam, power plant, transmission line and industrial railroad, is shown by the record to have an aggregate cost as of 1929 of approximately $46,000,000. This total cost includes the cost of acquiring the legal title to all of the lands in Maryland required for the actual construction of the project known and described in the record as the "Conowingo Project," and also those lands which, when the project was complete and the pool made by the dam across the Susquehanna River, might be affected, or be claimed to have been affected, and represents expenditures made to avoid possible suits for damage, or costs of titles requiring condemnation. Included in the "costs of lands" were the qualified paper titles to lands in the bed of the Susquehanna River outstanding at the time the project

was proposed. These titles represented lands continuously or from time to time covered by the waters of the Susquehanna River, having no value for practical use, but constituting a menace to the orderly progress of the work because of possible delays incident to condemnation, if not otherwise previously acquired.

The period of acquisition of title to the lands in question, which may be called the "submerged lands," extended over many years (the early plans for the development of the project having been inaugurated in 1782). The exact cost of acquisition is not ascertainable and therefore not to be found in the record of this case, but the assessed value of such "submerged lands" shown by this record was not in excess of ten dollars per acre prior to the year 1929, which is the taxable year for Harford County in the State of Maryland here under consideration.

The completion of the Conowingo Project resulted in the record ownership by the Appellant in the State of Maryland of (1) the dam across the Susquehanna River, on which was constructed a state highway for vehicles and pedestrians, (2) a hydro-electric power plant, (3) the transmission lines, (4) industrial railroad and rights of way from Havre de Grace to the power plant, (5) lands and buildings above the water line of the pool in the bed of the Susquehanna River (including administration buildings and farm lands in excess of those found to be needed for the project, and the bed of the Susquehanna River below the dam), and (6) *lands constituting the bed of the Susquehanna River* and therefore the bed of the pool above the dam, consisting in the aggregate in Harford County, Maryland, of 2110 acres.

It is only so much of the tax assessed against the submerged lands in the bed of the Susquehanna River for the year 1929 by the taxing authorities of the State of Maryland that was appealed from, the tax assessed against all of the other property of this Appellant hereinabove described having been unappealed from and paid. The assessed value of this property upon which this Appellant

paid taxes for the year 1929 to Harford County in the State of Maryland was the sum of $9,751,560. on which the tax aggregated $166,422.27.

The Appellant defended its refusal to pay the tax assessed upon the "submerged lands" constituting the bed of the Susquehanna River and valued for taxation at $2,349,300, for reasons among which those now for consideration by this Court are the following:—

Point 1.

The State of Maryland has no power to assess for taxation lands in the bed of the Susquehanna River, the paper title to which is held by the Appellant, after such lands have become completely and permanently submerged in aid of navigation pursuant to the terms of the Federal License granted to Appellant.

Point 2.

The submerged lands in the bed of the Susquehanna River under the pool, the flow of the water from which is made available by the dam and power plant to generate electrical energy, were not available for such use by the Appellant prior to the granting of the Federal License by the Federal Power Commission under authority from the Congress of the United States, and any value attributable to such lands in the bed of the Susquehanna River by such use results from the exercise of the Federal grant and cannot be made the basis for taxation by the State of Maryland.

Point 3.

If the submerged lands are subject to taxation by the State of Maryland at all, the taxable value thereof lawfully cannot exceed their value as land, and no assessment thereof is lawful which exceeds that of other similar, but unsubmerged, lands.

Point 1. The State of Maryland has no power to assess for taxation lands in the bed of the Susquehanna River, the paper title to which is held by the Appellant, after such lands have become completely and permanently submerged in aid of navigation pursuant to the terms of the Federal License granted to Appellant.

The Susquehanna River is a navigable stream. Of this fact there can be no doubt. The bed thereof was declared to be "a public highway" by the State of Maryland as early as 1798, by the State of Pennsylvania in 1801, and again by the State of Maryland in 1814. This Court in the case of *Shively* v. *Bowlby*, 152 U. S. 1 (1893), said (at page 31):—

> "The earliest judicial statement of the now prevailing doctrine in this country as to the title in the soil of rivers really navigable, although above the ebb and flow of the tide, is to be found in a case involving the claim of a riparian proprietor to an exclusive fishery in the Susquehanna River, in which Chief Justice Tilghman in 1807, after observing that the rule of the common law upon the subject had not been adopted in Pennsylvania, said: 'The common law principle is, in fact, that the owners of the banks have no right to the water of navigable rivers. Now the Susquehanna is a navigable river, and therefore the owners of its banks have no such right. It is said, however, that some of the cases assert that by navigable rivers are meant rivers in which there is no flow or reflow of the tide. This definition may be very proper in England, where there is no river of considerable importance as to navigation, which has not a flow of the tide; but it would be highly unreasonable when applied to our large rivers, such as the Ohio, Allegheny, Delaware, Schuylkill, or

Susquehanna and its branches.' Carson *v.* Blazer, 2 Binney, 475, 477, 478."

The Supreme Court of Maryland in the case of *Havre de Grace* v. *Harlow*, 129 Md. 265 (1916), reviewed some of the history of commerce on the Susquehanna River in Maryland, *inter alia*, as follows (*id.* p. 275) :—

"The downstream navigation seems to have been of two classes—canal boats, which had been built further up the stream, which were too wide to admit of their passage through the locks of the canals, and which were brought down unloaded, to be taken for use upon the Erie and other canals; secondly, arks or rafts, which were made of logs or lumber, and which, though drawing at the most between three and four feet of water, could not be brought down when the river was in its normal state of flow, but only at the times of flood, when the water was about four feet above its normal height. The season for these seems to have been approximately two months in the spring of the year, though in one exceptional season there is evidence tending to show that they came down during every month of the year. Occasionally these rafts bore upon them some slight loads, consisting of potatoes, which were sold to those living along the river's banks, a little pig iron, on one occasion a barrel of whiskey, and on another certain family furniture. These loads did not, however, constitute the important traffic upon the river. That was the bringing down of the logs, most of which appear to have been disposed of at saw mills along the way, while some after reaching tide-water were rafted for the lumber market of New York, Philadelphia and Baltimore. A half century and more ago this lumber traffic upon the river is testified to have been very considerable in volume, but that it has gradually and steadily fallen off, and that the last of the commerce of this character to come down the river was fifteen years ago. The extinction of this com-

> merce was due, however, not to the erection of bridges or dams across the river, but to entirely different causes, viz, the formation of considerable bars at the mouths of some of the creeks emptying into the river, thus forming natural obstacles to its navigation, and more especially to the fact that the merchantable lumber upon the upper reaches of the river had been cut off for a distance of approximately thirteen miles back from the stream, so that the cost of hauling to the river was as great, if not actually greater, than the cost of its transportation by rail. It was owing to causes such as these that the year 1902 witnessed but two rafts coming down the river, where theretofore in the fifties and sixties of the last century, they had been numbered by the hundreds."

The Court finally held in said Havre de Grace case that no injunction should issue against the building of a dam under Appellant's 1908 Charter because (p. 278):—

> "After a full consideration of the facts as testified to in this case, and a careful examination of the Act of 1908, this Court is of opinion that the proposed dams, if constructed in accordance with the requirements of the Act, are not such obstructions to the navigable character of the river as to warrant the granting of the injunction sought by the bill."

The above cited decisions show that the Susquehanna River in Maryland has been found as a fact to be a navigable river, and even though interstate traffic upon it had diminished it was so classified as late as 1916. Subsequent thereto, as this record shows, the Federal Power Commission, acting under authority of the Federal Water Power Act of 1920, found as a fact (R. 290) that the Susquehanna River was navigable and in aid of navigation granted to this Appellant the Federal License for the building of the Conowingo Dam to improve the navigation on the Susquehanna River. The situation is similar to that existing on the Desplaines River,

and with reference to the exclusive control of the United States over that river, because it was to be classed as a navigable river, this Court, in the opinion of Mr. Justice Pitney in *Economy Light Company* v. *United States*, 256 U. S. 113 (pp. 123-124), says:—

> "We concur in the opinion of the Circuit Court of Appeals that a river having actual navigable capacity in its natural state and capable of carrying commerce among the States, is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions. And we agree that the provisions of §9 of the Act of 1899 (30 Stat. 1151) apply to such a stream. The act in terms applies to 'any * * * navigable river, or other navigable water of the United States'; and, without doing violence to its manifest purpose, we cannot limit its prohibition to such navigable waters as were, at the time of its passage, or now are, actually open for use. The Desplaines River, after being of practical service as a highway of commerce for a century and a half, fell into disuse, partly through changes in the course of trade or methods of navigation, or changes in its own condition, partly as the result of artificial obstructions. In consequence, it has been out of use for a hundred years; but a hundred years is a brief space in the life of a nation; improvements in the methods of water transportation or increased cost in other methods of transportation may restore the usefulness of this stream; since it is a natural interstate waterway, it is within the power of Congress to improve it at the public expense; and it is not difficult to believe that many other streams are in like condition and require only the exertion of federal control to make them again important avenues of commerce among the States. If they are

> to be abandoned, it is for Congress, not the courts, so to declare. The policy of Congress is clearly evidenced in the Act of 1899, and, in the present case at least, nothing remains but to give effect to it."

This language may be used appropriately to answer the contention of the Appellee that there is no basis for the conclusion that prior or subsequent to the building of the Conowingo Dam the Susquehanna River was a navigable stream.

Even the Maryland Court of Appeals in this case, in spite of its following cautious comment (R. p. 329) :—

> "Whether the Susquehanna River is in law or fact navigable is a question not presented by this record and not considered by this Court, and nothing in this opinion contained is to be construed as in any sense determining that question or determining the validity of any legislation relating thereto,"

nevertheless said in its opinion (R. p. 329) with respect to the Susquehanna River:—

> "That it is a navigable stream within the definition of 'navigable waters' found in the 'Water Power Act' * * * *may for the purposes of this case be assumed.*"

For the purposes of this case, therefore, it would seem that we start with the proposition that the subject of the assessment here appealed from *is the bed of a navigable river.*

The technical title to the bed of this navigable river *to the extent that the State of Maryland had the power to grant such title,* is in the Appellant. There is no dispute on this point. The extent and character of that title, however, is vastly different from Appellant's title to the neighboring "fast" or shore lands, none of which are involved in this appeal. The kind and character of Appellant's technical title to these "river bottom" or "submerged" lands

has been clearly defined by this Court in a number of earlier cases from which the following have been selected:—

In *Philadelphia* v. *Stimson*, 223 U. S. 605 (1912), the Chief Justice of this Court, in discussing the title to the bed of the Ohio River, in Allegheny County, Pennsylvania, said (p. 634):—

> "To this stream, as a highway of commerce, the power of Congress extended; a power which 'acknowledges no limitations other than are prescribed in the Constitution.' Gibbons *v.* Ogden, 9 Wheat. 1, 196. The exercise of this power could not be fettered *by any grant made by the State of the soil which formed the bed of the river,* or by any authority conferred by the State for the creation of obstructions to its navigation. 'Commerce includes navigation. The power to regula- commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress. This necessarily includes the power to keep them open and free from obstructions to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England.' Gilman *v.* Philadelphia, 3 Wall. 713, 725.
>
> "Nor is the authority of Congress limited to so much of the water of the river as flows over the bed of forty years ago. The alterations produced in the course of years by the action of the water do not restrict the exercise of Federal control in the regulation

of commerce. Its bed may vary and its banks may change, but the Federal power remains paramount over the stream, and this control may not be defeated by the action of the State in restricting the public right of navigation within the river's ancient lines. The public right of navigation follows the stream (Rolle's Abr. 390; Carlisle *v.* Graham, L. R. 4 Ex. 361, 367, 368) and the authority of Congress goes with it."

In the case of *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53 (1913), this Court again defined the nature of private ownership in the bed of a navigable river as follows (p. 62):—

"It is subordinate to the public right of navigation and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the States and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress. All means having some positive relation to the end in view which are not forbidden by some other provision of the Constitution, are admissible. If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation. If its judgment be that structures placed in the river and upon such submerged land, are an obstruction or hindrance to the proper use of the river for purposes of navigation, it may require their removal and forbid the use of the bed of the river by the owner in any way which in its judgment is injurious to the dominant right of navigation."

The ownership by the Appellant prior to the construction of the "Conowingo Project" gave it no private right to use the waters flowing over it to develop water power and therefore there was no such potential value attributable to these lands available for taxation. Since the completion of the dam the lands have not changed their character but their use has been permanently devoted under the Federal License to the improvement of navigation and of the exclusion of other possible uses than the impounding of these waters. No structure has been erected upon them—the difference is that the waters of the river rest upon them longer and to a greater depth before passing beyond the dam to meet the tidal waters below. Can it be said that because of control of the flow of the Susquehanna River by the "Conowingo Dam" the submerged lands above the dam have increased in taxable value, solely as land, from $10. per acre to $1113.00 per acre?

The decision of this Court in *Economy Light Company* v. *United States,* 256 U. S. 113, is clear authority for the assertion by the Appellant that regardless of the paper title conveyed to it by or with the consent of the State of Maryland, there was no power vested in the Appellant by such title to the full use and enjoyment of the lands in the bed of the Susquehanna River without the consent of the United States, because of the provisions of the Act of Congress of March 3, 1899 (30 Stat. 1151), by which the authority of Congress over all navigable waters was asserted.

The foregoing case of *United States* v. *Chandler-Dunbar* (229 U. S. 53) is of still further significance in the present case because it was there flatly decided that in a condemnation proceeding by the United States of a Power Company's title to the banks and bed of a navigable stream no compensation whatever will be allowed with respect to the Power Company's ownership of the bed of the river. The contention made by the Power Company in that case to support the lower court's award to it of $550,000. as "the estimated value of the water power" was (p. 61):—

> "* * * the claim is that the United States in the exercise of the power to regulate commerce, may not

exclude the rights of riparian owners to construct in the river and upon their own submerged lands such appliances as are necessary to control and use the current for commercial purposes, provided only that such structures do not impede or hinder navigation and that the flow of the stream is not so diminished as to leave less than every possible requirement of navigation, present and future."

In rejecting this claim the Supreme Court said (p. 69):—

"It is a little difficult to understand the basis for the claim that in appropriating the upland bordering upon this stretch of water, the Government not only takes the land but also the great water power which potentially exists in the river. The broad claim that the water power of the stream is appurtenant to the bank owned by it, and not dependent upon ownership of the soil over which the river flows has been advanced. But whether this private right to the use of the flow of the water and flow of the stream be based upon the qualified title which the company had to the bed of the river over which it flows or the ownership of land bordering upon the river, is of no prime importance. In neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; *but that the running water in a great navigable stream is capable of private ownership is inconceivable.*"

The Maryland Court of Appeals failed to appreciate the applicability of the principles of law laid down in the Chandler-Dunbar case or it would not have made the following statement in its opinion (Rec. 337), viz.:—

"The appellant used the submerged land to impound water to furnish power to turn the wheels of its generating units. But the use of the impounded water for navigation will not on the one hand lessen the power which it delivers for that use nor will the fact that it delivers power affect its use for navigation. Both uses

> are complementary, neither is exclusive, both are valuable one is essentially public in its nature, not the subject of private ownership, and therefore not taxable, while the other is an incident of the ownership of land submerged by the pent up water, which land may be privately owned and because of its utility for impounding water may be valuable and may be taxed. City of Lowell *vs.* Co. Com. of Middlesex, 9 L. R. A. 363. Farnham on water, secs. 432, 433, Cooley on Taxation, secs. 568, 1065, 1162."

None of the authorities cited by the Maryland Court involve navigable waters of the United States and this Court expressly held in the *Chandler-Dunbar Case* (229 U. S. 76), that the owner of the river bed had *"no right to appropriate the current to his own commercial use."*

The Appellee and the learned Court below rely upon the decision of this Court in *Baltimore Shipbuilding Company* v. *Baltimore,* 195 U. S. 375, as conclusive of the right to tax the Appellant on the valuation given to the bed of the Susquehanna River, presumably because the subject matter of the two cases was a right in real property. The power to tax claimed in the Baltimore Shipbuilding Company case appears to have been sustained because the Court found (p. 382) that the United States had "no easement or present right *in rem.*" On the contrary, in this case the *rem* is the bed of the Susquehanna River, and in the Chandler-Dunbar case, and other cases, which have considered the navigable waters of the United States, this Court has held that as to such *rem* it is subject at all times to the use and control of the United States. In *Philadelphia* v. *Stimson,* 223 U. S. 605, p. 634, it was said of the Ohio River, also a navigable river as the Susquehanna River has been declared to be,

> "To this stream as a highway of commerce, the power of Congress extended; a power which 'acknowledges no limitation other than as prescribed in the Constitution.'"

If under the positive ruling of the Chandler-Dunbar case, the technical title of the Appellant to the submerged lands in question does not include title to the only thing which might give them a value, by what possible theory can the State of Maryland lawfully assess those submerged lands for taxation against this Appellant at the rate of over a thousand dollars an acre?

In the cases of *Central Railroad Co.* v. *Jersey City*, 209 U. S. 473, and *Leary* v. *Jersey City*, 248 U. S. 328, the question as to the power of a State to tax the bed of navigable waters devoted by authority of Congress and action by the duly constituted authorities of the United States to an improvement for navigation was not raised because in both cases the argument and decision related to the authority over the land under the pact between the State of New Jersey and the State of New York, which authority was in dispute.

In the pact, as will be seen by the records in both of those cases, the approval given by the United States through Congress (Act of Congress June 28, 1834, 4 Stat. L. 808) was conditioned by the reservation therein made:—

> "Provided, That nothing therein contained shall be construed to impair or affect the right of jurisdiction of the United States in and over the islands or waters which form the subject of this agreement."

The lands which were the subject matter of those decisions were harbor lands on which improvements had been made or were intended for use in connection with the use of the uplands. None of the land in question had been devoted by action of the United States, under its reservation in the pact, to use for or as an improvement to the navigation of the waters subject exclusively to Federal jurisdiction.

In the case now before this Court no question is raised similar to the question in the Jersey City cases, relied upon by the Appellee, although this question may have been for consideration prior to the building of the Conowingo dam,

when the lands then owned by the Appellant, at least at low water, were available for other uses analogous to the uses of the lands described in the Jersey City cases.

Whether or not prior to the exercise of the power exclusively vested in the United States, which has resulted in the complete submerging of the lands in question in aid of navigation in the Susquehanna River, these lands were lawfully subject to taxation by the State of Maryland, is not under consideration, as the taxes upon them at the rate of $10. per acre were paid without protest.

The question before this Court is one not decided by any previous decisions, and, is whether the submerged lands under navigable waters subjected and adopted by the proper authorities of the United States as an instrumentality for the improvement of such navigable waters are still subject to taxation by the State in which they are located?

Point 2. The submerged lands in the bed of the Susquehanna River under the pool, the flow of the water from which is made available by the dam and power plant to generate electrical energy, were not available for such use by the Appellant prior to the granting of the Federal License by the Federal Power Commission under authority from the Congress of the United States, and any value attributable to such lands in the bed of the Susquehanna River by such use results from the exercise of the Federal grant and cannot be made the basis for taxation by the State of Maryland.

The Chandler-Dunbar case (*supra*) and the authorities which have followed it were urged upon the learned court below to show that there was no taxable value in the lands in the bed of the Susquehanna River covered by the paper title held by the Appellant prior to the granting of the Federal License by the Federal Power Commission.

Practical evidence of this asserted fact was presented in the nominal assessed value in previous years of $10.00 per

acre. It was contended before the learned court below that the utilization of the water flowing over the lands in the bed of the Susquehanna River was made possible solely because of the position acquired by the Appellant as a Licensee of the United States of America under the License granted by the Federal Power Commission and that if the lands attained a value thereby, attributable to the Federal License, such value, thus created, afforded no basis for taxation by the State of Maryland.

The learned court below, however, disposed of this contention as follows (Record, pp. 331, 332, 333):—

> "The mere fact that the impounding of water by its dam may to some extent facilitate navigation for a short distance, is incidental and secondary to its primary purpose of manufacturing and selling electric energy for profit, and it is not required to do any act or thing in aid of the Federal government except that it is permitted or licensed to complete a project for its own profit which incidentally may effect beneficially or otherwise the navigability of the river."
>
> * * * * * * *
>
> "The principal and controlling facts are that the licensee desired to establish on the Susquehanna river a power project to make money for its stockholders, that to accomplish that purpose it required a Federal license, and that the Federal government in consideration for that license exacted of the licensee certain concessions which may be valuable or meaningless accordingly as they may be affected by conditions which cannot now be predicted. But even though the licensee is required to do every act required by the license, there is nothing in the nature or the extent of its obligation which can support the inference that the payment by it of its proportionate share of the public taxes will in any degree impair its capacity to render to the United States the full service stipulated as a consideration for the license.

> "That the numerous and extensive power projects located on navigable waters, licensed by the Federal Power Commission, in the aggregate representing vast capital expenditures, and earning for their proprietors liberal returns on their investment, should under the conditions stated be regarded as Federal agencies and as such exempt from the burden of taxation common to all who receive the benefits and the protection of State governments it is imposed to support would be a wholly unreasonable and arbitrary conclusion."

The characterization by the Court below of the purpose of the Appellant to use part of its property for commercial profit cannot be extended to justify a tax, by indirection, of the property clearly entitled to the immunity herein asserted for it. The decision of this Court in *Macallen* v. *Massachusetts*, 279 U. S. 620, so holds (p. 629):—

> "'These constitute special and compelling reasons why courts, in scrutinizing taxing acts like that here involved, should be acute to distinguish between an exaction which in substance and reality is what it pretends to be, and a scheme to lay a tax upon a non-taxable subject by a deceptive use of words. The fact that a tax ostensibly laid upon a taxable subject is to be measured by the value of a non-taxable subject at once suggests the probability that it was the latter rather than the former that the law-maker sought to reach. If inquiry discloses persuasive grounds for the conclusion that such is the real purpose and effect of the legislation, the tax cannot be upheld without subverting the well-established rule that '* * * what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result * * * constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on

the letter, yet in substance and effect destroy the grant or limitation.' Fairbank *v.* United States, 181 U. S. 283, 294, 300."

It would naturally be assumed by a reading of the opinion of the learned court below that the Appellant was claiming before that court a right of exemption from taxation for the physical property used in the generation of electrical energy after the water of the Susquehanna River passed over the submerged land in question through the outlets in the dam which had impounded them.

The opinion ignores the conceded facts upon the record that as to such facilities no question of exemption was being raised. The tax levied upon those facilities was not in dispute. This tax aggregated for the year 1929 the sum of $166,422.27 and was paid to Harford County.

Whether or not, as to the physical assets used primarily in the generation of electrical energy, by reason of the interest which the United States has in the entire Conowingo Project as licensor under the terms of the Federal License, there was an exemption available to this Appellant is a question not before the Court of Appeals of Maryland and is not argued before this Court.

The status of the particular property herein referred to (*i. e.*, "submerged lands") of the Appellant as a Federal agency and its right to exemption thereof from taxation by the State of Maryland, is determined by a consideration of its relationship to the United States as an instrumentality whereby the Federal government has improved and provides for the maintenance of facilities for navigation in the Susquehanna River for a distance of at least 14 miles.

It is solely because of the finding that the creation of the pool in Maryland and Pennsylvania was in aid of navigation that the Federal Power Commission asserted authority to issue the Federal License. Pursuant to the terms of the Federal License (Record, pp. 288 to 312) the Appellant undertook its work thereunder for the purposes

therein stated, which *inter alia,* were (Record, pp. 290, 292):—

> "Whereas, The Commission finds that said project, as hereinafter described, will be best adapted to a comprehensive scheme of improvement and utilization of said waterway for the purposes of navigation, of water power development and of other beneficial uses; and
>
> "Whereas, The Commission, did, on the second day of January, 1925, find that the contemplated improvement is desirable and justified in the public interest for the purpose of improving or developing a waterway, namely, said Susquehanna River, for the use or benefit of interstate and foreign commerce, a certified copy of the records of the Commission containing such finding being hereto attached; and"
>
> * * * * * * *
>
> "The Commission hereby issues this license to the licensees for the purpose of constructing, operating and maintaining certain project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of powers across, along, from or in said Susquehanna River, and constituting a part of the project hereinafter described;"

The project when completed, as heretofore stated, produced as an improvement to the navigation of the Susquehanna River a 14-mile long lake, having a depth in places of approximately 90 feet, and forming one link in a chain of similar lakes described heretofore in the Statement of the Case. (See Photograph attached to this Brief.)

The learned Court of Appeals disposed of the Appellant's contention that in maintaining such an aid to the navigation of the Susquehanna River the lands so used by it as a Federal agency were exempt from taxation by the following language (Record, p. 331):—

> "But assuming that it is a Federal agency after careful consideration of the very forcible and able arguments offered in support of it, we are unable to find any substantial support for the Power Company's contention that it is such a Federal agency as is necessarily exempt from State taxation, or that the payment to the state of just and reasonable taxes on its property will to any extent prevent it from discharging every duty and performing every function imposed upon it either by its agreement or by law with respect to the Federal government."

The Appellant asserts that the facts shown in this record clearly demonstrate that to the extent of its "submerged lands" it is a Federal instrumentality of the class protected by the decisions of this Court from state taxation.

The tax levied for the year 1929 is in itself a burden upon the instrumentality in use by the Appellant as a Federal aid to navigation and creates an interference with the exercise of the Federal power prohibited by the Federal Constitution and of a nature against which the Appellant is entitled to the protection of the decisions of this Court.

Panhandle Oil Company v. *Knox*, 277 U. S. 218:—

This case involved the validity of a State tax upon the sale of gasoline to the United States for the use of its Coast Guard Fleet in service in the Gulf of Mexico and its Veterans' Hospital at Gulfport. The State Supreme Court held the exaction to be a valid privilege tax measured by the number of gallons sold and that it did not constitute a tax upon instrumentalities of the Federal Government. In reversing this decision Mr. Justice Butler, speaking for this Court, said (p. 221):—

> "The United States is empowered by the Constitution to maintain and operate the fleet and hospital. Art. 1, § 8 (ref. to Fed. Const.). That authorization and laws enacted pursuant thereto are supreme

(Art. 6); and, in case of conflict, they control state enactments. The states may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of Federal functions."

Long v. *Rockwood,* 277 U. S. 142:—

This case involved the validity of a Massachusetts income tax upon royalties derived from patents issued by the Federal Government. The Supreme Court of the State held such an imposition would amount to a tax upon the patent right itself and was prohibited by the Federal Constitution and the Supreme Court said "We agree with that conclusion." After citing the provisions of the Constitution empowering Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"; and the various enactments of Congress pursuant thereto, this Court, speaking by Mr. Justice McReynolds, said (p. 147):—

> "The power to exclude others granted by the United States to the patentee subserves a definite public purpose—to promote the progress of science and useful arts. The patent is the instrument by which that end is to be accomplished. It affords protection during the specified period in consideration of benefits conferred by the inventor. And the settled doctrine is that such instrumentalities may not be taxed by the states."

On January 2, 1925, the Federal Power Commission made its specific findings to the effect heretofore quoted with respect to the then contemplated Conowingo Project and under date of February 20, 1926, issued its License (Record, p. 292):—

> "for the purpose of constructing, operating and maintaining certain project works necessary or convenient

for the development and improvement of navigation and for the development, transmission, and utilization of powers across, along, from or in said Susquehanna River, and constituting a part of the project hereinafter described;"

By means of the said property and the project works so erected thereon there has been created and is being maintained, for the primary purpose of interstate navigation, a pool of slack water extending for a distance of approximately fourteen miles from a point in Maryland to a point in Pennsylvania. Without the authority from Congress conferred by said License, granted pursuant to said Act, neither this Appellant nor any other person or corporation could in such manner lawfully utilize said property or build or maintain said project works. *Alabama Power Company* v. *Gulf Power Company*, 283 Fed. 606.

In *California* v. *Pacific Railroad Co.*, 127 U. S. 1, quoted with approval by Mr. Justice McReynolds in Long *v.* Rockwood (*supra*), this Court seems to support this contention of the Appellant in the following language (p. 41):—

"In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in McCulloch *v.* Maryland, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive

of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this court in McCulloch *v.* Maryland, 4 Wheat. 316; Osborn *v.* The Bank of the United States, 9 Wheat. 738; and Brown *v.* Maryland, 12 Wheat. 419; and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed."

Point 3. If the submerged lands are subject to taxation by the State of Maryland at all, the taxable value thereof lawfully cannot exceed their value as land, and no assessment thereof is lawful which exceeds that of other similar, but unsubmerged, lands.

Under the statutory law of Maryland (referred to by the Court below, Rec. 338) the State Tax Commission was given in the act of its creation:—

> "The final determination of assessments of all property in all the counties, cities, towns and villages of the State, to the end that all taxable property shall be placed upon the assessment books and *equalized* between persons, firms and corporations in all the counties, districts, cities, towns and villages of the State, so that all persons, firms and corporations *shall be assessed alike for like kinds of property.*" 1924 Maryland Code, Article 81, Section 249, Paragraph 2.

The learned Court of Appeals has held that the land in the bed of a navigable river can be considered as a thing separate and distinct from the water over it (Rec. 336).

The learned Court of Appeals has also held that no value in the assessment of "submerged lands" by the State Tax Commission was given by reason of the Federal License or franchises but that the land was taxed as such, even though not divided into parcels for separate taxation.

To support its proposition that the bed of a navigable stream may be the subject of private ownership, the Court of Appeals cites its earlier case of *Browne* v. *Kennedy*, 5 H. & J. 195. It is submitted that the facts in the Browne case bear no analogy to the instant case, for there Jones' Falls in Baltimore City had been diverted entirely from its bed into a canal and the controversy in ejectment was between the contiguous proprietors *over the title to the then exposed dry bed.* In *Morris* v. *United States*, 174 U. S. 196, this Court, in referring to the Browne case, *supra*, as well as the later Maryland case of *Wilson* v. *Inloes*, 11 G. & J. 359, summarized the Maryland law as declared in these cases to be as follows (p. 238):—

> "The State has the right to grant the soil covered by a navigable water subject to the public or common right of navigation and fishery, and inferentially that a title originating in a patent issued under general law from the Land Office attached to the land and gave a right of possession *when the waters ceased to exist.*"

It would seem from the above that the assessment upon this theory must be limited to that value which the land in the bed of the Susquehanna River, to which the Appellant has the paper title, would have "when the waters ceased to exist" and that for the purpose of taxation in 1929, that event must be assumed to have happened and such value then available to the holder of the paper title. This assumption was a fact prior to the construction of the Conowingo Dam as to a substantial part of the bed of the Susquehanna River during the periods of low water, and during years prior to 1929 these lands carried a taxable value of $10. per acre. The value given by the State Tax Commission for the year 1929 to rocky hill sides owned by Appellant was at the rate of $20. per acre (Rec. p. 317), although the testimony presented for the Appellant, of record in this case, was to the effect that untillable farm land owned by other taxpayers in the neighborhood, such as wooded land, carried the uniform assessment of $10. an acre, while rocky hill sides

carried no assessment at all against *other* taxpayers (Rec. p. 114).

The Court below, however, brushed aside this testimony of the Appellant by referring to it (Rec. p. 343) as:—

> "some more or less meaningless testimony as to the value of farm land in the neighborhood."

and declared the problem of the State Tax Commission (Rec. p. 348) to be free from the duties of comparison:—

> *"because of the unique character of the project there was no other property within the State which was like it, which could be used as a standard to measure its value."*

The learned Court of Appeals of Maryland has sustained what the Appellant contended was an unlawful assessment by the State Tax Commission, regardless of its apparently excessive valuation when compared with the assessment of other lands in Maryland, *on the theory that there was no basis for comparison* and therefore the Commission was entitled to use its best judgment in fixing the utilizable value of the bed of the Susquehanna River as a whole (Record, p. 341):—

> "The real value of these lands lies in the fact that they form a natural basin through which a large river flows and within a few miles falls nearly one hundred feet, and that by the erection of a dam across the only outlet from that basin, the waters of that river may be impounded so as to generate nearly six hundred thousand horse power. To say that its utility for that purpose adds nothing to the value of the land, or, what in effect is the same thing to say that the value created by that utility cannot be taxed because such a tax would be imposed upon flowing water simply ignores the facts."

The further conclusions of the learned Court below show that there is no limit to which the opinion of the taxing

authorities for the State of Maryland in the future may increase the burden carried by the Appellant's "improved facilities for the navigation of the Susquehanna River."

The learned Court below uses language which put the bed of the Susquehanna River in a class by itself for taxation in the State of Maryland. The limit of its valuation is obviously only the desire of the taxing authorities for funds (Record, pp. 338, 339):—

> "In assessing appellant's property therefore the Commission was bound to ascertain and declare its actual fair value and to assess it accordingly, but in approaching that problem it was confronted by certain difficulties inherent in the nature of the undertaking. First, there was the absence of any general market for property of that character, because the value of the submerged lands depended so largely upon the contingency that capital could be secured to install the expensive and extensive equipment necessary to develop their latent possibilities, that lands could not well be sold at their real value unless sold as a part of or as ancillary to an entire project which included the structures and machinery needed to realize their highest utility. Again because of the unique character of the project *there was no other property within the state which was like it, which could be used as a standard to measure its value.*"

Appellant now submits that if the submerged lands in question are to be assessed at all, they must be assessed without taking into consideration any value attributable to the waters flowing over them or attributable to the Federal License, and therefore they must be assessed as an area of waste land covered with rocks and boulders. If any other land of a similar character can be found in the neighborhood the assessed valuation must be comparable to the value placed upon such other land. It is for this reason that testimony of the assessed value of all other land in the neighborhood was submitted by Appellant. This testimony (Rec. pp.114-

117), shows clearly that there is a uniform classification of non-tillable lands in this taxing district (Harford County), with assessed values ranging as follows (Rec. pp. 114-117):

	Range of Assessed Value	
Classification	*Minimum*	*Maximum*
"Wooded Land"	$10.00	$10.00
"Pasture" or "Standing Pasture"	$15.00	$30.00

and the witness (Rec. p. 114) made this significant statement:—

> "I mean that wooded land is always assessed at $10.00 an acre and rocky hill sides are never assessed at anything that I have ever seen, and I have taken the lists, one hundred lists, and checked them and have never found a rocky hill side assessed at anything."

It is apparent from the foregoing that these "submerged lands," if not exempt, should be assessed at "the regular county rates" (R. 108) which is either $10. per acre or nothing at all.

CONCLUSION.

It would seem to be indisputable that had the Federal Government decided to erect a dam across the Susquehanna River by the expenditure of public funds and by reason thereof had denied the application of the Appellant for a license from the Federal Power Commission, the pool thereby created (14 miles in length) would have improved the navigability of the Susquehanna River without changing the character of the lands in the bed of the river, the paper title to which could have continued in this Appellant. Under the applicable decisions of this Court it seems clear that this Appellant would have had no grounds to complain of such an improvement of the navigation of the Susquehanna River,

nor would it have been entitled to damages by reason of this use of the bed of the river to which it had paper title.

If such had been the action by the Federal Government, could the State of Maryland then lawfully levy a tax upon the lands forming the bed of the pool so created, the paper title to which remained in this Appellant?

If we assume that the Federal Government at its own expense had erected the Conowingo Dam, and thereafter, by a license from the Federal Power Commission, had granted permission to this Appellant to build a hydro-electric plant below the dam to use the waters impounded by the dam, would the exercise of such Federal authority by this Appellant create a power in the State of Maryland to levy a tax upon the lands of this Appellant forming the bed of the river above the dam which had been constructed by the Federal Government in aid of navigation?

The judgment of the Court of Appeals of the State of Maryland should be reversed.

Respectfully submitted,

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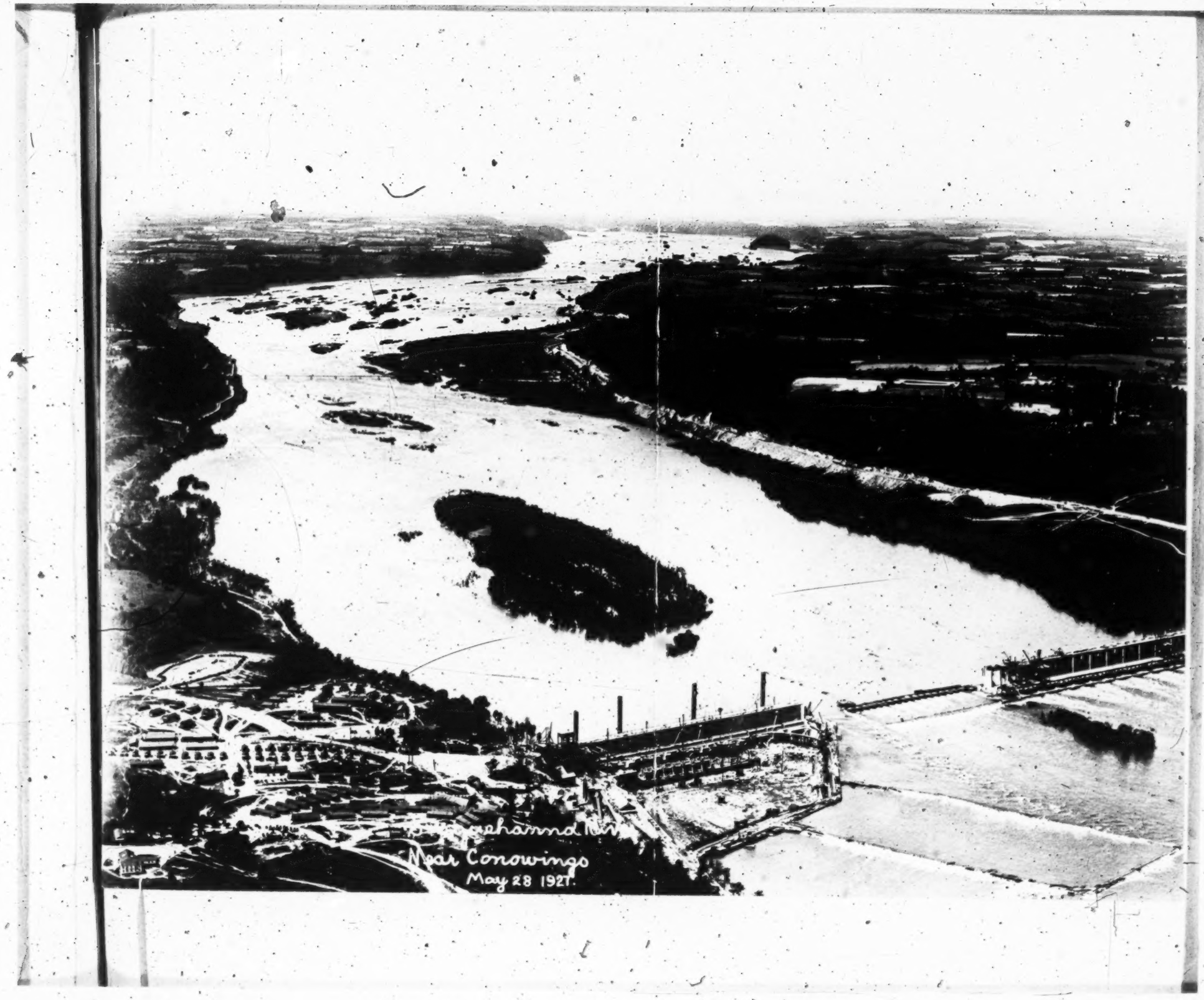
Near Conowingo
May 28 1927.

Susquehanna River
Near Conowingo
Sept. 5- 1927

Susquehanna River
"Conowingo" Project No. 405
July 30 1928

APPENDIX.

FOURTEENTH AMENDMENT OF FEDERAL CONSTITUTION.

Section 1 of Article XIV of the Amendments of the Federal Constitution:—

"SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

COMMERCE CLAUSE OF FEDERAL CONSTITUTION.

Article I, Section 8 of the Constitution of the United States:—

"SECTION 8. The Congress shall have Power * * *;

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U. S. C. A., TITLE 28, SECTION 344, SUB-SECTION (a).

"SUB-SECTION (a)—A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute

of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

ACT OF THE GENERAL ASSEMBLY OF MARYLAND 1908, CHAPTER 268, SECTION 5 (A PART OF APPELLANT'S "1908 CHARTER").

"SEC. 5. And be it further enacted, That in consideration of the construction by the said Susquehanna Power Company, its successors or assigns of a dam or dams in, along or across the said river and its shares and the canals, railroads, ferries or highways thereon, thereabout or leading thereto, and backing the waters of said river, thereby either singly or in series to the elevation to which said dam or dams may be erected, and either with or without the aid of the canals hereinafter mentioned, said Susquehanna Power Company, its successors and assigns be and it is hereby declared to be also a slack water navigation company with all the powers and authorities of the charters of the Tidewater Canal Company and the proprietors of the Susquehanna Canal to the end that *in aid of the powers of Congress* it may create a safe and practicable navigation up and down said river, either upon the bed thereof, by means of said back water or otherwise, or by means of a canal or canals along the margin thereof, or by means of such methods conjointly, either above or below said dam or dams, to the end that real navigation of said river above tidewater in Maryland heretofore so often unsuccessfully attempted, may now be established, and in addition to its present powers, the said Susquehanna Power Company, its successors and assigns, is hereby vested with the following exclusive powers, liberties, privileges, benefits, franchises and immunities, that is to say:

"(*a*) To cut, re-cut or enlarge canals along the shores of said river, with dimensions commensurate with the beam, displacement tonnage and motive power of all vessels which shall navigate the back water formed by its said dam or dams, and erect, equip and maintain all dams, feeders, acqueducts, locks, wharves and basins, and such other appurtenances and accessories thereto as may be necessary, and in order to acquire the necessary property for each of the objects aforesaid, shall have all the powers of section 3 herein as well as such powers contained in said charters of the proprietors of the Susquehanna Canal and Tidewater Canal Company as are duly applicable to such acquisition without limit to the quantity of land to be condemned except the necessity of said corporation as by it determined.

"(*b*) To acquire own and hold by purchase or otherwise the stock, franchises, property or assets of, or exchange stock with, merge with or consolidate with the said Tidewater Canal Company or the proprietors of the Susquehanna Canal or the 'Susquehanna Canal and Power Company' a corporation of Pennsylvania or of any other corporation or association, whatsoever or wheresoever, and also to assume pay or guarantee any indebtedness or contracts of any other corporation or association on such terms or conditions as may be mutually agreed upon.

"(*c*) To charge and collect tolls for the navigation of the bed of said river above its dam or dams or of the tail races thereof, not exceeding the rate of two cents per ton per mile, as a remuneration to said corporation for the improvements aforesaid."